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A RESPONSE ON BEHALF OF THE COMPUTER INDUSTRY TO ASSEMBLY BILL NO. 1507

**Gordon K. Davidson
David L. Hayes***

Assembly Bill No. 1507(AB1507) was introduced in the California Assembly by Assemblywoman Gloria Molina on March 6, 1985, to provide specific warranty protection for computer products. The bill would drastically change existing law by singling out computer products for special treatment and prohibiting suppliers of computer products from limiting certain express and implied warranties. The bill would also give purchasers and lessees of computer products a presumptive right to return the products within six months of purchase or lease upon breach of such warranties.

The computer industry has strongly opposed the bill because it considerably broadens the liability of computer product suppliers and infringes upon traditional principles of freedom of contract. The bill would change what have become standard industry contracting practices and alter the balance of risks and economics in the computer industry.

AB1507 was passed by the California Assembly in June 1985, but was withdrawn by Assemblywoman Molina from Senate Committee consideration in August after the computer industry organized strong opposition. However, the bill will be considered again by the California Legislature in early 1986.

This article examines AB1507 and the issues it raises from the perspective of suppliers of computer products, and argues that AB1507 is unnecessary in the light of existing consumer protection law and attempts to remedy perceived problems by means that are inappropriate for most of the situations in which the bill would be applied.

I. SUMMARY OF AB1507

AB1507 would make a number of changes in existing Califor-

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nia warranty law for computer products by significantly expanding the remedies currently available to consumers under the California Commercial Code(U.C.C.), the California Song-Beverly Consumer Warranty Act¹ and the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.² The bill would provide the following unique protections for purchasers and lessees of new computer hardware and software products in California:

A. Warranty of Merchantability

A non-disclaimable warranty of merchantability by both the manufacturer and the seller, if the seller is a dealer. "Dealer" is not defined. "Seller" is defined to include a lessor. For purposes of this section, "merchantability" has a meaning similar to that used in the U.C.C., which requires that the product: (1) passes without objection in the trade under the contract description; (2) is fit for ordinary purposes for which the product is used; (3) is adequately contained, packaged and labeled; and (4) conforms to the promise or affirmations of fact made on its container or label.³

B. Implied Warranty of Fitness

A non-disclaimable warranty of fitness for the buyer's purpose if the manufacturer or the seller has reason to know any particular purpose for which the buyer required the product and the buyer is relying on the skill or judgment of the manufacturer or seller to select or furnish a suitable product to the buyer. "Suitable" is not defined.

C. Express Warranty for Advertisements

A non-disclaimable express warranty by the manufacturer and the seller that the product conforms in all material respects to the description of the technical specifications and performance capabilities of the product as set forth in the manufacturer's or seller's *advertisements* of the product. For this purpose, "advertisement" broadly includes any medium that promotes, directly or indirectly, the sale or lease of computer products. Written or oral statements made directly to an individual buyer that are expressions of an individual sales agent's viewpoint or recommendation are not considered to be advertisements, but the person on whose behalf the

1. CAL. CIV. CODE §§ 1790-95.7 (West 1985).

2. 15 U.S.C. §§ 2301-12 (1983).

3. U.C.C. § 2-314 (1977).

statement is made has the burden of proving that the statement is not a warranty.

D. Right to Revoke Acceptance for Six Months

The right of the buyer to revoke acceptance of the product if the manufacturer or seller has limited the buyer's remedies, such as by limiting the remedies to repair and replacement, and if that limited remedy fails promptly to cure a breach of the warranty. The bill creates a "rebuttable presumption" that notice of revocation is given within a "reasonable time" if it is communicated by the buyer within six months of the purchase or installation of the product.

E. Attorneys' Fees

If the buyer prevails in an action to enforce any liability created by the bill, the buyer shall be awarded reasonable attorneys' fees (based on the actual time reasonably expended) and litigation expenses. The award of fees and expenses is mandatory.

F. Civil Penalties

If the manufacturer or seller "willfully neglects" to accept a buyer's rightful rejection or revocation of acceptance within a reasonable time, the buyer can also recover a civil penalty of up to two times the buyer's actual damages.

G. Other Remedies

All rights and remedies provided by the bill are intended to be cumulative and are in addition to any other procedures, rights or remedies available to a buyer under other provisions of law, including the California Commercial Code.

H. Statute of Limitations

Any action under the bill can be commenced within four years after the cause of action has accrued. It does not appear that the limitations period can be shortened by contract, as permitted by the U.C.C.

I. Exceptions

There are only two exceptions to the bill's broad coverage. The provisions of the bill do not apply to:

1. \$25,000 Business Transactions

A sale (but not a lease) by an original equipment manufacturer to a business purchaser for a business purpose in a transaction in which the total purchase price exceeds \$25,000. The terms "original equipment manufacturer", "business purchaser" and "business purpose" are not defined.

2. Custom Programs

The sale or lease of a custom computer program, which is defined as a program prepared to the special order of the customer.

II. THE UNCERTAIN PURPOSE OF AB1507

A. *Brief History of the Evolution of Warranties for Computer Hardware and Software*

Warranties have almost always been provided for computer hardware, and continue to be so today. Manufacturers of hardware customarily provide warranties that their equipment will be free from defects for a period that typically ranges from 90 days to one year. After the warranty period, the manufacturer generally offers an ongoing service or maintenance contract to keep the equipment in good working order.

Contracting practices in the software industry evolved differently, in part for historical reasons and in part because of the different nature of hardware and software. The first commercially available digital computers appeared in the early 1950's. For about the first ten years thereafter, software and hardware were "bundled" together and sold as one package. Because the cost of the hardware was by far the dominant factor in the cost of a computer, the value of software as an independent product was not recognized. Indeed, many manufacturers gave away systems and other software to promote hardware sales. Not until 1969 did "unbundling" of software—primarily applications programs—become standard industry practice, giving birth to the software industry.⁴

Even after unbundling, both hardware and software acquisitions were major purchases usually acquired through individually negotiated contracts between large business entities and computer manufacturers. Software was often custom developed, and warranties were individually negotiated. As the software industry grew and the sale of packaged or "canned" programs became more prev-

4. See Brooks, *Computer Technology for Lawyers*, COMPUTER LAW INSTITUTE 1985 11, 120-21 (1985).

alent, software suppliers were faced with the decision of what kind of warranty should be provided for licenses of standard "off-the-shelf" programs to largely unknown customers.

Software presented a very different warranty issue for suppliers than did hardware. Computer hardware is designed to perform a limited number of functions or operations, repeatedly. Given the binary logic used by the computer hardware and the high reliability of semiconductor circuitry, it is possible to make a definitive determination whether a given piece of hardware works correctly.

The same is not true for software. Unlike computer hardware, for which the basic operations are limited, the possible combinations of operations under control of the software to perform different applications are infinite. It is impossible to test a computer program of even moderate complexity exhaustively because of the infinite combinations of data that may be "input" into the program. Although it is possible to determine whether, for a given set of inputs, the program runs correctly, it is not possible to say that a program will run correctly for every possible set of inputs. Moreover, the results of a program malfunction are unpredictable and can be catastrophic — the program may stop execution entirely or may give wildly erroneous results.

Programmers, therefore, typically aver that there is no such thing as a program without "bugs"; there are only programs whose bugs have not all been discovered — yet. Given this immutable "law" of computer programming, software developers have been very wary of warranting that a program is "free from defects", as is often warranted for hardware products. Moreover, the law has been far from clear concerning the liability of a software supplier for damages caused by a software malfunction. As a result, the conservative legal advice has traditionally been that software suppliers should disclaim all warranties and should offer software only on an "as is" basis.

Recently, as the industry has matured, as competition has intensified, and as some "base" technologies have solidified in common application areas such as word processing and spreadsheets, many software suppliers have been willing to make *express* warranties that their software will perform as, or at least "substantially" as, described in the appropriate user or technical manual that accompanies the software. But the uncertain implications of the *implied* warranties of the U.C.C. have, for the reasons discussed below, led suppliers to disclaim such warranties.

As should be apparent from this brief discussion, the warranty

issues that concern software are quite different from those that concern hardware. Although traditional warranties of defect-free operation make sense for hardware, it is virtually impossible to warrant "defect-free" operation of software, or, indeed, even to define "defect", given the tremendous range of possible uses to which software may be put by users of widely varying sophistication and needs. Thus, it is very important that any legislation in the computer area take into account the differences between hardware and software as well as the tremendous variety of users and uses of software. As discussed in the next section, AB1507 fails to do this.

B. *The Incoherent Thrust of AB1507*

AB1507 was apparently born of Assemblywoman Molina's frustrating experience of purchasing a personal computer to assist with legislative mailings and her unsuccessful attempts to get it to run certain mail-merge software. Assemblywoman Molina says that the bill is aimed at the "new macho frontier" in high-tech marketing of computer products without consumer responsibility.⁵ It is unclear, however, what the contours of the "frontier" are and what aspects of it exhibit irresponsibility.

Much support for the bill seems to be a reaction to the practice of microcomputer software suppliers of licensing software "as is", without any warranty of performance. There also seems to be a feeling among supporters of the bill that software programs are rushed to market before they are adequately tested and that suppliers of software hide behind the warranty disclaimer to "shove" untested technologies "down the customers' throats."⁶

Although such rhetoric is calculated to draw emotional reactions, the fact is that any company taking such an approach to business would not last long. To the contrary, software suppliers generally do test software thoroughly, but, as noted, they simply cannot test their programs exhaustively. All software contains minor "bugs" or errors. The consistent practice in the industry, even for those suppliers who provide software on an "as is" basis, is to offer corrections of bugs to customers either free or for a nominal update charge. Those suppliers who do otherwise will not long remain in business.

AB1507 does not seem to be a "consumer" protection bill in the traditional sense because it applies to business transactions of

5. California Computer News, Apr. 19, 1985, at 19.

6. Wall Street Journal, Oct. 2, 1985, at 33, col. 4.

\$25,000 or less as well as to consumer transactions. Perhaps the aim of AB1507 is to better educate naive first-time customers. Unfortunately, this bill will have the opposite effect, as discussed below, because it will penalize suppliers for informative advertising and thereby deter them from conveying substantive information in their advertising.

In sum, the wrong that the bill is attempting to rectify is not coherently defined. The bill's requirements do not distinguish between hardware and software, nor do they, with limited exceptions, distinguish between consumer and business purchasers. As a result, the bill strikes at many potential problem areas with a very blunt instrument, leading to unintended and undesirable effects in many other areas.

III. SPECIFIC CONCERNS OF THE COMPUTER INDUSTRY

The computer industry has a number of specific concerns with various provisions of AB1507, as discussed below.

A. *Warranties of Merchantability*

Under the U.C.C., if the seller of a product is a merchant, there is—unless it is conspicuously disclaimed—an implied warranty that the product passes without objection in the trade under the contract description and is fit for the ordinary purpose for which the product is used. AB1507 would automatically create this implied warranty for all computer products, other than the two limited exceptions noted above, if the seller is a “dealer” with respect to those products, and would forbid manufacturers and sellers from disclaiming the warranty.

Although the concept of a warranty of merchantability may make sense for staple commodities, such as grade 3 wheat or even an automobile, it is very difficult to define the “ordinary purpose” to which a particular computer program is put, except in a very broad sense. Because programs are designed to accomplish different tasks, for different computers, with different capabilities and limitations, there are no precise industry standards by which to measure them. How can one determine, for example, whether a mail-merge program “passes without objection” in the trade or “is fit for the ordinary purposes” for which it is used? A given personal computer and mail-merge program may be perfectly capable of handling mailing lists of 100 names — enough for a Christmas card list, but not enough for a campaign mailing list to three million registered voters. Which is the standard of merchantability? Who decides?

B. *Implied Warranties of Fitness for a Particular Purpose*

Under the U.C.C., if the seller knows the purpose for which the buyer requires the goods and knows that the buyer is relying on the seller to furnish suitable goods, there arises an implied warranty of fitness for a particular purpose, unless it is effectively disclaimed. There will be many instances in which the seller knowingly and willingly accepts this risk. For example, OEMs who supply a system to a business to meet its particular needs might warrant that the system is fit for a particular purpose. But the U.C.C. provides freedom to reallocate this risk by contract where the risk is too great for the seller to bear or the sales price is based on the assumption that the buyer will assess fitness. AB1507 would mandatorily impose the risk on the seller.

There are a host of problems with this mandatory application of the warranty of fitness for a particular purpose to the computer context. First, the sophistication of buyers varies enormously. A buyer may inadequately or imprecisely express his or her particular needs to the vendor, or may have unrealistic expectations of what the software should do in order to satisfy the buyer's needs. Even if the purposes to which a program or system is to be put are accurately conveyed, how user friendly or functionally sophisticated must a program be to be "fit" for the articulated purpose? A particular word processing program, for example, may be completely satisfactory for one user, but unsatisfactory to another. And what is to be the result if a vendor sells a system or software based upon one articulated need and the buyer, as often happens with computer systems, uses it for a different, but related, need?

Moreover, the uses to which most software programs and computer systems may be put is very broad. Often, only users will fully understand their particular requirements or the scope of the risks to be undertaken in the use of a computer system. Users of computers have put them to work controlling nuclear reactors, medical experiments, air traffic at airports, securities trading at stock exchanges, funds transfers at banks and many other applications in which consequences of a computational error may be enormous. In many instances the user should properly assume the risk for deciding what system is fit for the purpose at hand. AB1507 would prohibit that.

C. *Express Warranties for Advertisements*

Under the U.C.C., any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of "the basis of the bargain" creates an express warranty that the

goods conform to the affirmation or promise.⁷ Under appropriate circumstances, advertisements can and do become part of the "basis of the bargain," but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create an express warranty under the U.C.C.⁸

AB1507 would change this established rule of commercial law by elevating any "advertisement" to an express warranty, if the advertisement is one upon which prospective buyers normally rely and is a contributing cause of the sale. For this purpose, "advertisement" includes "a commercial message in a newspaper, magazine, leaflet, brochure, flyer, manual or catalog, on radio or television or in any other telecommunications medium, or in any other medium, that promotes, directly or indirectly, the sale or lease of the product."⁹

The vagueness of the standard itself is quite problematic, but AB1507 compounds the problem by imposing on the person on whose behalf the advertisement is made the *burden of proving* that the advertisement does not constitute an express warranty. To do this, the manufacturer or seller must prove one of two negatives: (1) that the advertisement was not a "contributing cause of the sale" in the particular instance or (2) that the advertisement is not the kind on which prospective buyers normally rely. How either proposition is to be proved is puzzling at best.

Like the U.C.C., AB1507 contains an exception for expressions of opinion, but AB1507's formulation is much narrower. First, it excludes only written or oral statements to an *individual buyer* that are merely an expression of an *individual sales agent's* own viewpoint, opinion or recommendation, provided that it has not been set forth in any telecommunications or other "medium" of advertising. Thus, AB1507 effectively excludes only one-on-one statements of opinion; unlike the U.C.C., it does not exclude statements of opinion or value that have been disseminated in any conventional advertising medium. Second, AB1507 again imposes on the person on whose behalf the statement is made the burden of proving that a statement by an individual sales agent does not constitute an express warranty within the meaning of the bill.

The concern of the computer industry here is twofold. First,

7. U.C.C. § 2-313(1)(a) (1977).

8. U.C.C. § 2-313(2) (1977).

9. Cal. A.B. 1507, 1985-86 Regular Sess., proposed CAL. CIV. CODE § 1797.7(e)(1) (1986).

this formulation would single out and subject the computer industry to greater liability, when no reason has been suggested why the U.C.C. "basis of the bargain" standard for warranty liability does not work in the computer industry. Second, and more importantly, it will discourage computer industry vendors from advertising products in any meaningful way. Every advertisement, every flyer, every brochure would have to be scrutinized by lawyers under the new standard proposed by AB1507, and those lawyers would doubtless expunge from the advertisements all but the most harmless pap.

Certainly cases of misrepresentation and sharp sales practices may occur in the computer industry, as in any other industry. Although such practices should properly be curbed, effective legal weapons for doing so already exist. Moreover, the computer industry possesses a unique countermeasure of its own — an extremely active industry press. There are, for example, more periodicals covering the microcomputer industry than there are surviving microcomputer hardware manufacturers. As a result, there is a wealth of information, including very detailed hardware and software reviews, for virtually every new product manufactured and sold. In short, consumers are not without resources they can readily consult, short of the legislature and the courts, to ensure that they select the appropriate computer products for their needs.

Thus, AB1507 would stifle rather than encourage the communication of information about computer products because of the stiff burden it would impose on manufacturers and sellers. The result would ultimately be to hurt the consumer.

D. *Six Month Right to Revoke*

AB1507 gives the consumer a right to revoke acceptance of a computer product "within a reasonable time" that at first glance appears to be rather narrowly circumscribed. The right comes into play only if two conditions are met: (1) "the manufacturer or seller has limited the buyer's remedies, such as by limiting the remedies to repair and replacement of nonconforming parts" and (2) "that limited remedy fails to promptly cure a breach of the warranty."¹⁰ The bill creates a rebuttable presumption that notice of election to revoke acceptance has been given within a reasonable time if the notice is given within six months after purchase or installation of the product. The bill also provides that if a manufacturer or seller willfully neglects to accept a buyer's rightful rejection or revocation of

10. Cal. A.B. 1507, 1985-86 Regular Sess., proposed CAL. CIV. CODE § 1797.7(g)(1) (1986).

acceptance, the manufacturer or seller can be liable for a penalty of up to two times the buyer's actual damages in a civil action.¹¹

Realistically, there will be few instances in which this right to revoke will not apply. With respect to hardware, it is common practice to limit remedies to repair or replacement of non-conforming parts. With respect to software, it is customary to limit remedies to replacement of defective media, fixing "bugs" for a certain period of time, and, in some instances, provide a refund if bugs that render the software unusable cannot be fixed. Apparently *any* limitation of remedies will satisfy the first condition triggering the right to revoke.

With respect to the second condition, it is possible that any remedy short of an express right to return a good at the pleasure of the buyer will fail "to promptly cure" a breach of warranty. An imaginative buyer can almost always find some breach of the extensive warranties required by the bill. For example, a buyer may claim that the good is not merchantable because better products exist at the same price, or that the good does not fit the buyer's particular purposes, or that the good does not conform to some item contained in an advertisement. To remedy any of these claimed breaches would require modification of the software or hardware, which is arguably not a "prompt" cure. Because of the threat of double damages and attorneys' fees,¹² manufacturers and sellers may well end up being forced to accept without question any claimed revocation, rather than taking a chance on litigating whether the revocation is "rightful." The net effect will be to grant buyers a near-absolute right to return products for six months.

Such a near-absolute right poses several problems. It allows consumers, and perhaps even overstocked dealers, acting in bad

11. *Id.* at § 1797.7(j).

12. AB1507 makes mandatory an award of attorneys' fees to a prevailing buyer in an action to enforce any liability created by the bill. The rationale behind this award is presumably to avoid the deterrent effect of the costs of litigation in small cases where the buyer does not have enough money at stake to justify hiring an attorney. The Song-Beverly Act, however, already provides for attorneys' fees for a *consumer* buyer who brings a successful action against a manufacturer or seller who does not live up to its warranty obligations. CAL. CIV. CODE § 1794 (West 1985). There is no apparent reason why an additional stimulus to litigation is necessary in a computer context. If the goal is to equalize bargaining power, why not award attorneys' fees to the successful manufacturer or seller if the buyer has brought a meritless claim? The California Civil Code, for example, provides that any term in a contract giving one party the right to recover attorneys' fees shall by operation of law give the other party the reciprocal right if it prevails. CAL. CIV. CODE § 1717 (West 1985). There is no reason why this principle should not apply in the context of computer products. Indeed, such a principle might discourage bad faith use of the extensive right to return products that AB1507 provides.

faith to return products on the pretext of breach of warranty in order to purchase others. The potential for bad faith claims of this kind is enhanced by the fact that six months may be more than a product's commercial lifetime as more advanced products, or new versions of earlier products, are introduced. It may promote piracy of software by tempting customers to copy the software and return the original for a refund. Even for returns made in good faith, purchasers of most commercially available software and hardware, particularly in the personal computer market, should be expected to discover a material breach of warranty much sooner than six months. If anything, AB1507 should create a rebuttable presumption that six months is not a reasonable time. Factors such as a manufacturer's repeated failures to cure the breach could rebut that presumption.¹³

E. *Consumer Versus Business Transactions*

As noted earlier, one of the central problems with AB1507 is that it is unclear what wrong the bill is trying to make right. That uncertainty manifests itself most strongly in the irrational way in which the bill defines the transactions to which it applies. The bill does not, for example, cleanly separate consumer transactions from business transactions, as does most current consumer protection legislation, such as the Song-Beverly Act. Under the Song-Beverly Act, a buyer of a warranted consumer product has the right to recover the purchase price of non-conforming products, actual damages and, in certain circumstances, double damages against the warrantor.¹⁴ AB1507 would add similar penalties in a non-consumer context. No reason is apparent why, in a business transaction, the familiar rules of the U.C.C. should not govern and the parties should be denied the freedom to allocate the risks between themselves by contract.

1. \$25,000 Business Transactions

AB1507 does make a rough distinction between consumer transactions and at least some large business transactions. The bill exempts from its provisions a "sale made by an original equipment manufacturer to a business purchaser for a business purpose in a transaction in which the total purchase price paid or payable by the

13. See, e.g., *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 5 Ohio St. 3d 181, 449 N.E.2d 1289 (1983) (plaintiff drove car 35,000 miles before revocation, but dealer repeatedly failed to remedy breach of warranty).

14. CAL. CIV. CODE § 1794 (West 1985).

buyer exceeds twenty-five thousand dollars.”¹⁵ This distinction was hastily conceived and has a number of technical flaws.

For example, the exception applies only to “sales” involving more than \$25,000, despite the fact that AB1507 generally applies to sales *or leases* of computer products. Whether or not this distinction was intended, it is nonsensical. A \$25,000 lease is just as commercially significant as a \$25,000 sale, and is more likely to have been negotiated at arms length with the participation of counsel. For some reason that is not apparent, AB1507 exempts only \$25,000 sales made by “original equipment manufacturers”, a term that the bill does not define. If this term is meant to exclude those who supply only software, as opposed to hardware and software as an integrated system, it makes little sense, and the bill does not suggest a rationale for the distinction.

Moreover, AB1507 defines neither “business purchaser” nor “business purpose” and leaves great room for litigation over these terms. If there is to be a business/consumer product distinction, it would be better to rely on the existing definitions in the consumer statutes, like the Magnuson-Moss Act and the Song-Beverly Act. Furthermore, it is not clear that such a business/consumer distinction is appropriate in this context. Perhaps the sophistication of the buyer is more important in acquiring computer products than whether such buyer is a “consumer” or a business. It is difficult to draw a conclusion concerning what elements should form the basis for affording protection under the bill given the uncertainty surrounding precisely what it is the bill is aimed at remedying.

In any event, the distinction that AB1507 does draw seems arbitrary and would probably have the effect of driving product prices to much higher levels. Any computer product supplier intending to remain in the business would have to factor the additional liabilities created by AB1507 into its pricing structure and pass the cost along to customers. Only companies planning not to honor their liabilities would not increase their prices. AB1507 would therefore have the untoward effect of giving a short term advantage to unscrupulous suppliers and raising the prices of the scrupulous suppliers.

2. Custom Programs

For some unexplained reason, AB1507 excepts from its purview “custom programs” that are prepared to the special order of

15. Cal. A.B. 1507, 1985-86 Regular Sess., proposed CAL. CIV. CODE § 1797.7(c)(1) (1986).

the customer. Borrowing from the sales tax law,¹⁶ AB1507 carefully distinguishes "canned" or prewritten programs (for which warranties cannot be disclaimed) from programs embodying modifications done to meet the customer's needs (for which warranties can be disclaimed). This distinction stands logic on its head: the seller of a canned program cannot disclaim the fitness for the customer's purpose if he has any reason to know any particular purpose for which the program is required, yet the vendor of a program developed specifically for a customer's particular need can disclaim that it is fit for the purpose for which it was commissioned.

If the transactions that the drafters of AB1507 wish to single out are those in which there is actual bargaining or negotiation between parties of roughly equal bargaining power, the bill should state so explicitly. But this distinction is what the U.C.C. already seeks to accomplish.¹⁷ It is not clear why such a blunt instrument as AB1507 is necessary in addition to the protections of the U.C.C. or why the bill draws the arbitrary distinctions it does.

IV. AB1507 IS UNNECESSARY

AB1507 must at bottom be a simple attempt to curb the abuses of overzealous computer sales persons who push inappropriate or inadequate computer products onto unsuspecting customers who do not understand the technology. If so, the bill is unnecessary. The case law is replete with decisions in which plaintiffs have successfully recovered against computer suppliers, notwithstanding conspicuous warranty disclaimers.¹⁸ National Cash Register

16. See CAL. REV. & TAX. CODE § 6010.9 (West Supp. 1985).

17. It is now fairly well settled that the U.C.C. applies to computer software as well as computer hardware transactions. See, e.g., *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), *aff'd in part and rev'd in part*, 604 F.2d 737 (2d Cir. 1979); *Chatlos Sys., Inc. v. Nat'l Cash Register Corp.*, 479 F. Supp. 738 (D.N.J. 1979), *aff'd, reh'g denied*, 670 F.2d 1304 (3d Cir. 1982); *Josten's Inc. v. Nat'l Computer Sys.*, 318 N.W.2d 691 (Minn. 1982).

18. See, e.g., *Consolidated Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385 (9th Cir. 1983) (technical specifications for a product held an express warranty despite disclaimer of all warranties, express and implied, in the contract); *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982) (warranty exclusion held unconscionable where there was an inequality of bargaining power, a complex piece of equipment was involved and the buyer had little knowledge to enable him to reach an independent determination as to whether the equipment would fulfill his needs and seller represented that the equipment was adequate). Moreover, in *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985), the court ruled that a computer supplier's failure to supply a system that worked as represented constituted a default so "fundamental" that a limitation on consequential damages in the contract under which the system was supplied was expunged from the contract.

Corporation(NCR), for example, has recently been saddled with judgments of \$2.6 million¹⁹ and \$5.8 million,²⁰ based on jury findings that NCR made misrepresentations in connection with the sale of computer systems.

Much, if not most, of the impetus behind AB1507 seems to be an emotional reaction to the "as is" language that appears in software warranty disclaimers. The language strikes the customer as offensive, for it seems to suggest that software suppliers are getting away with something or do not care about the quality of their products. These reactions are unjustified. The "as is" language, which is indeed strong and somewhat offensive, is statutorily prescribed²¹ to drive home the message to the consumer that the supplier cannot guarantee that the software will be without defects. This does not mean, however, that suppliers do not care about the quality of their products. As noted earlier, virtually all vendors of software, even those supplying software on an "as is" basis, offer support in the form of bug corrections and update services that make corrected and enhanced versions available to customers for no charge or a nominal charge. The demands of the marketplace ensure that reputable suppliers of software will be keenly interested in correcting bugs and providing corrected versions to customers.

Moreover, in response to the rigors of increased competition (and reduced conservatism among lawyers), an increasing number of software suppliers now warrant that their software will perform substantially in accordance with the descriptions in the user manuals or technical specifications supplied with the software. The "as is" warranty disclaimer, which has, in practice, never been as sweeping as its language would suggest anyway, may soon become a thing of the past.

No new legislation is necessary or desirable to impose a new standard of business ethics and a higher level of costs on the computer industry. The principal challenge of the software industry today is to develop enough useful software at a cost low enough to be within the reach of the large number of new computer owners. The task is not a simple one. Software research and development costs

19. *Glovatorium, Inc. v. NCR Corp.*, 684 F.2d 658, 663-64 (9th Cir. 1982).

20. *Lincoln Marini & Assos. v. Madonna*, No. 51520 (Sup. Ct. San Luis Obispo, May 20, 1985).

21. For example, the Song-Beverly Act provides that an "as is" disclaimer will be effective only if the writing is clear and conspicuous prior to sale and contains each of the following statements: (1) the goods are being sold "as is"; (2) the entire risk as to quality and performance is with the buyer; and (3) should the good prove defective, the buyer assumes all necessary servicing and repair costs. CAL. CIV CODE § 1792.4 (West 1985).

are very high. The marketplace is rapidly changing, and the risks for a software developer are correspondingly high. If developers are forced to shoulder additional legal liabilities, they may decide that the risks are too great and the rewards too low. To compound the problem, higher prices will encourage piracy, and software developers will, in turn, take fewer risks. The net results will be that consumers will have less software at a higher price, and they will resort to bootlegged copies of software, which come, of course, without warranty of any kind.

In sum, although AB1507 has a great deal of emotional appeal to consumer advocates, it is an unnecessary and misguided effort that will upset the existing legal and commercial practices that are just becoming familiar to a new industry and just coming into balance in the marketplace.